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90-1719 (1)

Supreme Court, U.S.
FILED
MAY 9 1991
OFFICE OF THE CLERK

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

GUSTAVE O. MATTIA, Petitioner

v.

EMPIRE BLUE CROSS & BLUE SHIELD and
ALBERT A. CARDONE, CEO, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Gustave O. Mattia, pro se
32 Ogden Avenue
White Plains, N. Y. 10605
(914) 949-9588

QUESTIONS PRESENTED

1. Does a district court fail to administer justly Rule 501 of the Federal Rules of Evidence when it employs and relies upon, in granting summary judgment to an employer in an age discrimination case, a third-party investigator, engaged by the employer and described to petitioner and the public as an "independent investigator", whose report, put forth by the employer as the culminating reason for petitioner's dismissal, has never been made available to petitioner or the courts and, hence, has never been subjected to rebuttal or cross-examination?

2. Should petitioner, having brought suit under the ADEA, be denied discovery and trial in the presence of contested issues of material fact merely because his evidence of discrimination is largely circumstantial?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Gustave O. Mattia and the respondents Empire Blue Cross and Blue Shield and Albert A. Cardone, CEO.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
OPINIONS BELOW	2
JURISDICTION	2
STATUTE INVOLVED	3
STATEMENT OF CASE	4
REASONS FOR GRANTING THE WRIT . .	18

I. The decision of the District Court, and the Second Circuit affirmation of that decision, extend the lawyer-client privilege beyond that intended by the Constitution and the Supreme Court.

II. The Courts below have exceeded their discretion in denying petitioner discovery and trial in the presence of circumstantial evidence and contested issues of material fact, conflicting with decisions of the Supreme Court and other Circuit Courts.

CONCLUSION	30
APPENDIX (Order and Denial of Petition for Rehearing by the Court of Appeals and Memorandum Decision and Order of the District Court).	a1

TABLE OF AUTHORITIES

Cases: Page

Boeing v. Shipman, 411 f.2d 365 (5th Cir. 1969) 26, 27

City of Philadelphia, Pa., a Municipal Corporation v. Westinghouse Electric Corp. et al., 205 F Supp 830, 831, (1962). 21

Elkins v. United States, 364 U.S. 206, 234 (1960) 21

Lauqesen v. The Anaconda Co., 510 F.2d 307 (1975) 28

Loeb v. Textron, Inc., 600 F.2d 1003 (1979) 27

cont'd. . . . .

TABLE OF AUTHORITIES Cont'd.

Cases: Page

McCorstin, Jr. v. United States Steel Corp., 621 F.2d 749 (1980) 26

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973) 27, 28

8 Trammel v. United States, 445 U.S. 40, 50 (1980) 20

United States v. Bryan, 339 U.S. 323, 331 (1950) 21

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1990

GUSTAVE O. MATTIA, Petitioner

v.

EMPIRE BLUE CROSS & BLUE SHIELD and
ALBERT A. CARDONE, CEO, Respondents

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Gustave O. Mattia respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United states Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on December 4, 1990 and issued as mandate on March 11, 1991.

OPINIONS BELOW

The opinion of the Court of Appeals for Second Circuit is reprinted in the appendix hereto, p. a1, infra, as is the denial of petition for rehearing, p. a4, infra.

The memorandum decision of the United States District Court for the Southern District of New York (Goettel, G. L.) is reprinted in the appendix hereto, p. a6, infra. The District Court's order is reprinted at p. a14, infra.

JURISDICTION

Invoking federal jurisdiction under the Age Discrimination in Employment Act of 1967, petitioner brought this suit in the Southern District of New York on January 10, 1990, and subsequently moved for summary judgment on February 21, 1990. Respondents cross-filed for

summary judgment on April 2, 1990. On May 15, 1990, the Southern District granted respondents summary judgment. See P. a6, infra (entered as order on June 15, 1990, p. a14, infra).

On petitioner's appeal, the Second Circuit on December 4, 1990, entered a judgment affirming the Southern District's decision. See p. a1, infra. Petitioner filed a petition for rehearing which was denied by Second Circuit on February 22, 1991. See p. a4, infra. Petitioner then moved for stay of mandate pending application for certiorari. Motion was denied by Second Circuit.

STATUTE INVOLVED

The Age Discrimination in Employment Act of 1967, Sections 621 et seq., Title 29, United States Code (ADEA)

STATEMENT OF THE CASE

Suit was brought in the Southern District of New York on January 10, 1990, invoking federal jurisdiction under the Age Discrimination in Employment Act of 1967.

Gustave O. Mattia, petitioner, was employed as Vice President and Treasurer of Empire Blue Cross and Blue Shield and its predecessor companies (with Albert A. Cardone, CEO, respondents) from October 9, 1973 until October 13, 1988, and as an employee until December 13, 1988.

At the time of petitioner's dismissal he was 57 years of age. Of all the vice-president-and-higher officers employed by respondents -- a large number of officers -- petitioner was the oldest. On his dismissal, his duties were assumed

by an officer 37 years of age.

It is petitioner's charge that respondents put discriminatory pressure on him over a period of several years for the purpose of getting him to resign because of his advancing age and the increasing cost of his retirement benefits, and that when petitioner, out of resentment and self-defense, ultimately reacted to the illegal pressures with a paper critical of management (infra), respondents then used the paper as a pretext for the discriminatory dismissal of petitioner nothwithstanding their having provoked the paper. Petitioner further charges that respondents employed a so-called "independent investigator" for the purpose of covering over petitioner's observations of managerial ineptitude and conflict of interest and to justify his

discriminatory dismissal.

Petitioner had carried forth the duties of his office in a consistently commendable fashion, earning the respect of his fellow officers, members of the board of directors and the financial and health care communities with which he dealt extensively on behalf of the company. Petitioner, father of five and grandfather of three, was known for his independence and for conducting an efficient, scrupulously honest operation, involving billions of dollars, in the midst of frequent scandal in the Wall Street community and within the local City government.

Petitioner contends that after some ten years of employment, having achieved vesting in 1983, the climate for him began to change with, first, subtle, then increasingly, bolder pressures

placed on him for the purpose of discouraging him and causing him to resign his position. The company's retirement program for which petitioner was eligible was highly unusual, designed many years ago for the express purpose of keeping employees with the company until normal retirement. (The company, in designing the retirement program, recognized that other, profit-making corporations offered higher salaries, bonuses and attractive perquisites and held out its unusual retirement program as a "carrot" to attract and keep talented employees). Throughout many years of employment the lump-sum retirement benefit increased only modestly, so that anyone who left the company after vesting but before normal retirement gave up a substantial proportion of the ultimate benefit. As

normal retirement approached, however, the accrual increased markedly, the last five to ten years adding very significant sums to the final lump-sum benefit. Additional benefits for those who remained to normal retirement were paid-up health insurance for the employee and his spouse and paid up life insurance on the life of the retired employee equal to two full years' salary at retirement and gradually diminishing to one full year's salary for life. In the financial struggles of the company in recent years a good deal of money was to be saved if long-term employees could be induced to leave the company before normal retirement, taking with them a substantially reduced benefit with the balance forfeited to the company.

Despite the pressures put on him, petitioner refused to resign and began

to make note of the many shortcomings and conflicts of interest on the part of the senior management and some members of the board of directors. Constantly subjected to pressure despite his excellent performance, petitioner, in June of 1986, sought the advice of an attorney who counseled him to take his concerns to the board of directors. With a management change at the senior-most level announced for 1987, petitioner decided to wait. The management change, however, proved unsettling. At the same time, discriminatory pressures on petitioner not only did not subside, but increased. During this period, many employees of the company were let go or encouraged to take reduced benefits through early retirement, thereby saving the company a great deal of money. Many of the employees who left the company were in

the protected age group under the Age Discrimination in Employment Act, and most of those hired during the same period were of a younger age group -- considerably younger than petitioner.

In December of 1987, in an effort to throw petitioner off guard, he was told that he was going to be elevated with increased responsibility, a meeting at which the readiness of petitioner's younger assistant to take over was explored by petitioner's supervisor. Instead, in April of 1988, petitioner's department was stripped, with a number of succesful functions which had been developed and nurtured by petitioner over the years going to younger, less experienced managers. Some of the functions stripped were later restored to the treasurer's office after petitioner's dismissal.

By the summer of 1988, during which a consultant was brought in by respondents to document highly technical knowledge held by petitioner, it was abundantly clear that a set-up was in place by respondent Cardone to oust petitioner who was rapidly becoming an "old-timer" on the management staff.

Weary of the constant harrassment (he had continued throughout to manage unstintingly the company's financial assets), and recalling the attorney's advice given him two years earlier, in October of 1988, petitioner sent a copy of a paper he had written, entitled "A Pro Forma Civil Petition" (the "paper") to several members of the board of directors in the hope of obtaining a hearing and contravening the deliberate and unjustified destruction of his career that was taking place. The paper

criticized some members of senior management and some members of the board of directors and pointed out areas of discrimination against petitioner. It was a harsh paper, reflecting the resentment petitioner felt for his mistreatment at the hands of respondents despite all the good he had done for the company, but petitioner stands behind the content of the paper. The paper was handled discreetly by petitioner, who considered it an internal matter.

Respondents claimed that petitioner's paper caused bad publicity and almost resulted in the loss of a large account. But petitioner has pointed out to the courts below that he had always handled the paper discreetly; that its proliferation and the leaks to the press were the sole responsibility of respondents; that respondents had been in

the press right along, invariably in a negative connotion; and that the account that had withheld temporarily its renewal had in fact been in jeopardy for some time because of price and service problems.

No hearing was ever granted petitioner.

Under the guise of an "independent investigation", which petitioner contends was no more than a coverup, respondent Cardone exonerated himself and his predecessor and used petitioner's paper as a pretext to dismiss petitioner, accomplishing what their efforts over several years had not accomplished -- the discriminatory discharge of petitioner.

The New York State Department of Insurance conducted its own investigation, also mentioned in the District Court memorandum decision, and, while lukewarm toward petitioner who had been

critical of the Department in his paper, and had also touched on conflict involving people close to the State administration, grudgingly acknowledged some validity to petitioner's concerns (". . .he does raise some important questions and does make some valid points. . .") and went on to make four important recommendations for change at the company.

Repspondents' fabricated comments to the press, presented by petitioner to the Courts below, were damaging to petitioner. Since his discharge petitioner has been unable to obtain a position comparable or near-comparable to his position with the company.

Despite respondents' proclamations to the public and to the entire employee body of the company that an "independent investigator" had been engaged objective-

ly to review the contents of petitioner's paper, the investigator's report has never been made public and was denied to petitioner. In its place, a very brief, superficial and trivial report was issued which deliberately obscured the facts of the investigation. This brief report was issued by a three-person ad hoc committee of the board of directors the objectivity of the chairman of which is seriously questionable because of his own conflicts of interest involving the company. These facts, too, were pointed out to the Courts below by petitioner.

In the absence of discovery and trial, the investigator's report has never been introduced into the record nor has petitioner been given his rightful opportunity to rebut and cross-examine. Yet, respondents, in announcing petitoner's dismissal to the press on the

day following completion of the "investigation", tied directly the dismissal of petitioner to the conclusions supposedly reached by the investigator.

Petitioner brought suit under the ADEA in District Court on January 10, 1990 (case no. 90 Civ 0147), following an ealier complaint filed with the EEOC; subsequently filed motion for summary judgment; a pre-trial meeting was held by the District Court Judge on March 12, 1990; Respondents filed cross-motion for summary judgment; A brief hearing took place on April 27, 1990; and on May 15, 1990, District Court issued its decision denying petitioner summary judgment and granting summary judgment to respondents. Petitioner appealed to Second Circuit which affirmed the District Court decision (docket no. 90-

7552). Second Circuit denied petitioner a rehearing.

In its memorandum decision, the District Court refers to the investigator variously as an "independent investigator" and as "outside counsel". The decision names the investigator and his firm. Yet the investigator's report has never been revealed to the public or to petitioner.

The District Court has never seen the investigator's report. The Court of Appeals has never seen the investigator's report. Petitioner was refused the report and has never seen it. The public has not seen the report, notwithstanding the fact that its supposed results were well publicized at the time of petitioner's dismissal. Yet the decisions in the courts below lean heavily on the "independent

investigation".

REASONS FOR GRANTING THE WRIT

I.

The decision of the District Court, Southern District of New York, and the Second Circuit affirmation of that decision, extend the lawyer-client privilege beyond that intended by the Constitution, the Congress and the Supreme Court.

Rule 501 of the Federal Rules of Evidence states that ..."A communication made in confidence has been recognized as privileged only if fostering of the relationship is considered important to society, such as lawyer-client ..., and the injury to such relationship that would result from disclosure exceeds the benefit gained from a fully informed

determination of litigation." Respondents' case does not meet this test, as the responsibility of respondents to petitioner and to the public it exists to serve demands that all the facts be known. The attorney in question in this case was widely touted by respondents as an "independent investigator". But petitioner has pointed out in his papers to the courts below that the firm of the investigator in question was, at the time these events transpired and for some time before, representing a company employing members of respondents' board of directors and that the investigator himself was involved in the defense of that company in a case involving employee discrimination. Nor was the investigator one of respondents' regular lawyers prior to the "investigation". Furthermore,

respondent is a not-for profit corporation which exists through special enabling legislation of the State of New York to serve the public and, as such, has a special responsibility to ensure that the truth is made known.

Further, Rule 501 acknowledges the federal courts' authority to continue the evolutionary development of testimonial privileges in federal ... trials "governed by the principles of the common law as they may be interpreted ... in the light of reason and experience", thus providing the District Court with ample latitude to question, if not avoid entirely the use of, the "independent investigator" in this case.

In Trammel v. United States, 445 U.S. 40, 50 (1980), the Supreme Court, in its Opinion, said, "Testimonial exclusionary rules and privileges contravene the

fundamental principle that "'the public ... has a right to every man's evidence.'" United States v. Bryan, 339 U. S. 323, 331 (1950). As such, they must be strictly construed and accepted "only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth." Elkins v. United States, 364 U. S. 206, 234 (1960).

City of Philadelphia, Pennsylvania, a Municipal Corporation v. Westinghouse Electric Corporation et al., (205 F Supp 830, 831, 1962) reiterated the principle that protection of attorney-client privilege extends only to communications between attorney and client and not facts, and client may not refuse to

disclose any relevant fact within his knowledge merely because he incorporated statement of such fact into his communication to his attorney. The special investigator in this case was engaged to perform an independent investigation of facts. The facts have not been made known. Petitioner and the people have been denied their "right to know", concomitantly denying petitioner justice, because Rule 501 has not been administered by the Southern District of New York and Second Circuit in keeping with the intent of the Constitution and the Supreme Court.

If the decision is permitted to stand, any employer in violation of the ADEA and desiring to avoid due payment of employee benefits in a similar situation, need only hire an "independent investigator", suppress the investigator's findings, and

then have someone beholden to the employer, perhaps for reasons that conflict with the public good, create a trivial report that reaches the conclusions the employer wishes to foist on the public and the injured employee.

REASONS FOR GRANTING THE WRIT

II.

There are contested issues of material fact in this case which have been ovelooked in the courts below. While petitioner's evidence in support of his motion for summary judgment may be circumstantial, the District Court exceeded its discretion in awarding summary judgment to respondents, denying petitioner discovery and trial, given the precedents established by the Supreme Court and other Courts of Appeal.

The District Court, which dismissed with leave for petitioner to return under other theories of law, in rendering its decision, borrowed heavily and directly from respondents' pleadings, while overlooking virtually all those submitted by petitioner, including his sworn affidavits. For example, the memorandum decision goes into some detail on the events of October 7, 1988, but omits entirely the fact, included in petitioner's pleadings, that on that very same day petitioner was offered by respondents, mindful that they had wronged him, a contract (declined by petitioner) to consult with respondents over a three-year period for a total remuneration of $351,000 in exchange for an amicable departure, which contract also required petitioner to waive his rights under the ADEA and any similar

state and local laws. This was overlooked by the District Court nothwithstanding respondents' having admitted to these facts in their pleadings to the Court. Further, the memorandum decision takes almost verbatim from respondents' pleadings the notion that in sending his paper to some members of the board of directors petitioner circumvented the established chain of command, while overlooking entirely petitioner's communication with the chief executive officer, included as an exhibit in his pleadings, and his statement to the court that at about the end of August, 1988, he, petitioner, went to the company's general counsel, with whom he was acquainted, and who reported directly to the chief executive officer, and told the general counsel that harassment of petitioner would have to stop soon or

petitioner would have no choice but to take some action.

There are other oversights and errors in the District Court memorandum decision as well.

The Supreme Court and a number of the Circuit Courts of Appeal have ruled on similar cases:

U. S. Court of Apeals for Fifth Circuit in McCorstin, Jr. v. United States Steel Corporation, 621 F.2d 749 (1980), referring to Boeing v. Shipman, 411 F.2d 365 95th Cir. 1969)(en banc): "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence -- not just that evidence which supports the non-mover's case -- but in the light and with all reasonable inferences most favorable to the party opposed to the motion. ... it is the function of the

jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences, and determine the credibility of witnesses." And .... "Although there was evidence that McCorstin was fired for cause...there was also evidence of a pattern of terminating older workers when a reduction in force occurred allowing the reasonable inference that age had played a role in appellant's discharge. Therefore, under Boeing a jury question existed thus rendering the directed verdict inappropriate."

The Fifth Circuit in Loeb v. Textron, Inc., 600 F.2d 1003 (1979): "Proof of the McDonnell Douglas-type prima facie case assures the plaintiff his day in court despite the unavailablilty of direct evidence..."

Petitioner meets all tests of

McDonnell Douglas: (1) he was within the protected age group at the time of discharge (57); (2) he was fully capable of performing the job; (3) he was fired; and (4) he was replaced by someone 37 years of age. Had petitioner not been discriminated against and harassed over the previous several years, and thereby provoked, there would have been no paper sent to the board of directors, which paper respondents used as a pretext for petitioner's unlawful discharge, having failed to intimidate him into voluntary resignation.

The Sixth Circuit, in Laugesen v. The Anaconda Company, 510 F.2d 307 (1975), reversing a District Court decision in favor of the employer, said, "We reverse and remand, not because of the McDonnell Douglas contentions, but because ... even if more than one factor

affected the decision to discharge Mr. Laugesen, he could nevertheless recover if one factor was his age and it in fact made a difference in determining whether he was to be retained or discharged."... "The evidence is undisputed that in 1969 and 1970, Anaconda experienced its share of industry-wide economic difficulties which were reflected adversely in its profit and loss picture..."

Petitioner was discharged following a period of significant economic adversity for the respondents, thereby saving respondents a consideral sum of money for retirement benefits forfeited by petitioner (supra). And for months prior to petitioner's discharge, an "exchange" of employees had been taking place, with older employees leaving the company and younger employees being brought in.

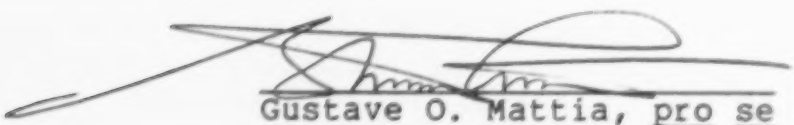
If the decision in this case is allowed

to stand, the intentions of the Congress, the Supreme Court and several Circuit Courts of Appeal will have been thwarted as regards the protections afforded older employees through the Age Discrimination in Employment Act of 1967. The intentions of the Older Worker's Benefit Protection Act of 1990 will have been thwarted as well.

CONCLUSION

For these reasons, this petition for certiorari should be granted. -

Respectfully submitted,



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May 7, 1991

JON

SDNY
90-cv-0147
GOETTEL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Filed Dec 4 1990

At a stated Term of the United States Court of Appeals for the Second Circuit, on the 4th day of December, one thousand nine hundred ninety.

PRESENT: HONORABLE JON O. NEWMAN,
HONORABLE RALPH K. WINTER,
Circuit Judges.
HONORABLE T.F. GILROY DALY,*
District Judge.

- - - - - - - - - - - - - - - - - - -

GUSTAVE O. MATTIA,
Plaintiff-Appellant,

v. 90-7552

EMPIRE BLUE CROSS AND BLUE SHIELD
and ALBERT A. CARDONE, CEO,
Defendants-Appellees.

- - - - - - - - - - - - - - - - - - -

O R D E R

Gustave O. Mattia appeals pro se from the June 20, 1990, judgment of the

District Court for Southern District of New York (Gerard L. Goettel, Judge) dismissing on motion for summary judgment appellant's complaint alleging age discrimination against his former employer and its chief executive officer.

As fully set forth in Judge Goettel's memorandum of decision, the undisputed evidence of Mattia's discharge raises no inference of age discrimination but instead makes it entirely clear that he was terminated because of his circulation of a 60-page report accusing his employer and its board of directors of various forms of misconduct. After the allegations were investigated by . . counsel specially retained to conduct the inquiry and found to be without substance, Mattia was discharged. Judge Goettel's dismissal was entirely correct.

The judgment of the District Court is affirmed.

/s/ Jon O. Newman

/s/ Ralph K. Winter
Circuit Judges.

/s/ T.F. Gilroy Daly
District Judge.

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* Of the District Court for the District of Connecticut, sitting by designation.

(Reprinted)

UNITED STATES COURT of APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the twenty-two day of February, one thousand nine hundred and ninety-one.

Filed Feb 22 1991

Present:

Hon. Jon O. Newman,

Hon. Ralph K. Winter,

Hon. T.F. Gilroy Daly.*

MATTIA

v. DOCKET NO. 90-7552

EMPIRE BLUE CROSS

A petition for rehearing having been filed herein by appellant, Gustave O. Mattia.

Upon consideration by the panel that decided the appeal, it is DENIED.

Ordered that said petition be and it hereby is DENIED.

/s/ Elaine B. Goldsmith,
Clerk

* Honorable T.F. Gilroy Daly, of the District Court of Connecticut, sitting by designation.

(Reprinted)

UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT
OF NEW YORK

- - - - - - - - - - - - - - - X

GUSTAVE O. MATTIA,

Plaintiff,

-against-

EMPIRE BLUE CROSS AND BLUE SHIELD and ALBERT A. CARDONE, C.E.O,

Defendants.

- - - - - - - - - - - - - - - X

90 Civ. 0147 (GLG)

MEMORANDUM DECISION

The plaintiff, bringing this action pro se, was a vice-president and treasurer of Empire Blue Cross and Blue Shield ("Empire") for 15 years. In October 1988, he prepared and circulated a 60 page memorandum detailing accusations of misconduct and mismanagement by Empire's board of directors. Mattia was then suspended with full pay pending investigation. Empire hired an

independent investigator to examine Mattia's allegations and the New York State Department of Insurance conducted its own investigation. When neither report found evidence supporting Mattia's accusations, Mattia's employment was terminated. Mattia contends that he was fired because of his age.(1) Both the plaintiff and the defendants move for summary judgment.

The Age Discrimination in Employment Act ("ADEA") prohibits an employer from discriminating against an individual with respect to his employment conditions or employment satatus based on his age. 29 U.S.C. Sect. 623(a) (1982). To establish a prima facie case of unlawful age

---

1 The plaintiff was 57 years old at the time his employment was terminated.

discrimination, the plaintiff must establish his membership in the protected age group, his qualification for the position he held, and that he was discharged "under circumstances that give rise to an inference of discrimination." Russo v. Trifari, Krussman & Fishel, Inc., 837 F.2d 40, 43 (2nd Cir. 1988).

The first two prongs of the plaintiff's prima facie case are easily met. The plaintiff was 57 years old at the time of discharge and was within the protected age group. Moreover, the plaintiff has offered proof that he was qualified to perform his job a the time of his discharge. The pitfall for the plaintiff is whether the circumstances under which he was discharged give rise to an inference of discrimination.

As briefly stated above, the

circumstances surrounding the plaintiff's dismissal are as follows. In early October 1988, the plaintiff distributed a petition to nine present and three former members of Empire's Board of Directors. The petition made allegations of, inter alia, self-dealing, waste, personal enrichment and conflicts of interest on the part of various members of the Board of Directors dating back over fifteen years. In distributing the petition to selected members of the Board of Directors, the plaintiff circumvented the established chain of command and went above the heads of his direct superiors. The petition rceived subbstantial attention in the press and temporarily jeoparized the defendants health insurance contract with the City of New York.

On October 7, 1988, at a meeting of the Executive Committee, Empire decided to retain outside counsel to investigate Mattia's allegations. It was also decided that the plaintiff would be suspended with full pay pending completion of the investigation. Louis Craco, Esq., a senior member of Willkie, Farr and Gallagher was retained to conduct the investigation. An ad hoc committee of one former and two present Board members were selected to oversee the investigation. The Department of Insurance also undertook an investigation of the plaintiff's allegations. On December 7, 1988, following Mr. Craco's investigation and report to the full Board of Directors, the ad hoc committed (sic) concluded that there was no evidence of misconduct supporting the plaintiff's allegations. On December 13,

1988, the defendant terminated the plaintiff's employment. On February 23, 1989, the Superintendent of Insurance concluded that the evidence did not support the plaintiff's charges.

The plaintiff has failed to demonstrate that the circumstances under which he was discharged give rise to an inference of age discrimination. There can be little doubt that the plaintiff's petition played a vital part in the defendant's decision to terminate his employment. Indeed, we would venture to say that it likely was the major motivating factor in his discharge. The plaintiff has not shown however, how his age per se played into the defendant's decision to discharge him, aside from the fact that plaintiff was 57 years old at the time.

The plaintiff has suggested that he

was terminated, in part, to deny him greater pension benefits than he would have earned had he been employed until normal retirement age. While this arguably could be in violation of other federal statutes, it is not discrimination based on age. Similarly, a discharge based on the plaintiff's petiton may be discriminatory but it does not become age discrimination simply because the plaintiff is in the protected age group. Because plaintiff has failed to offer any proof that permits an inference of age discrimination, we must dismiss the complaint for failure to establish a prima facie case. Thus, the defendant's motion for summary judgment is granted and the plaintiff's motion is denied. However, because plaintiff is pro se, and the facts alleged indicate the possiblility that he might be able to

state a cognizable cause of action on other legal theories, we dismiss with 20 days leave to replead.

SO ORDERED.

Dated: White Plains, N.Y.
May 15, 1990

/s/ _____
Gerard L. Goettel
U.S.D.J.

(Reprinted)

UNITED STATES DISTRICT
COURT SOUTHERN DISTRICT
OF NEW YORK

- - - - - - - - - - - - - - - X

GUSTAVE O. MATTIA,

Plaintiff,

-against-

EMPIRE BLUE CROSS AND BLUE SHIELD and ALBERT A. CARDONE, C.E.O,

Defendants.

- - - - - - - - - - - - - - - X

90 Civ. 0147 (GLG)

O R D E R

More than twenty days having passed since this court's Memorandum Decision dated May 15, 1990 in which the plaintiff's complaint was dismissed with twenty days leave to replead, and no amended pleadings having been filed, it is hereby

ORDERED that the clerk enter judgment for the defendant.

SO ORDERED.

Dated: White Plain, N.Y.
June 15, 1990

/s/ _____
GERARD L. GOETTEL
U.S.D.J.

(Reprinted)